UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JIMMIE G. COOPER,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION H-06-2160
	§	
MICHAEL J. ASTRUE,	§	
Commissioner of the Social	§	
Security Administration,	§	
	§	
Defendant.	§	

MEMORANDUM AND RECOMMENDATION

Plaintiff Jimmie G. Cooper filed this case under the Social Security Act, 42 U.S.C. § 405(g) for review of the final decision of the Commissioner denying her request for disability benefits. The parties have filed cross motions for summary judgment (Dkts. 14, 15). Having considered the parties' submissions, the administrative record, and applicable law, the court recommends that Cooper's motion be denied and the Commissioner's motion granted.

I. Background

Jimmie Cooper has a twelfth grade education and previously worked as a restaurant cook and institutional cleaner.[1] (Transcript "Tr." 22). On September 25, 2003 Cooper

[1] The record also refers to Cooper's position as a custodian job. The court notes that the correct title of Cooper's job is institutional cleaner. *See* Tr. 314 (explaining that custodian is a misnomer in the Dictionary of Occupational Titles (DOT) and refers to someone who cares for a locker room, locker room equipment, and athletic equipment).

applied for benefits under Titles II and XVI of the Social Security Act claiming disability since April 1, 1999 due to leg problems, feet problems, bleeding ulcers, high blood pressure, back surgery, depression, and anxiety. (Tr. 60, 22). After a hearing before an administrative law judge ("ALJ"), Cooper's claim was denied on August 19, 2005. (Tr. 33). The Appeals Council declined to review the ALJ's decision on June 5, 2006 (Tr. 5), making it the final decision of the agency subject to review by this court. Cooper filed suit in this court on June 28, 2006.

II. Applicable Law

A. Standard of Review

Section 405(g) of the Social Security Act sets forth the standard of review in this case. Federal courts review a decision denying Social Security benefits to determine whether (1) the Commissioner applied the proper legal standard and (2) the decision is supported by substantial evidence. *Waters v. Barnhart*, 276 F.3d 716, 718 (5th Cir. 2002); *Masterson v. Barnhart*, 309 F.3d 267, 272 (5th Cir. 2002). Substantial evidence is "more than a scintilla and less than a preponderance." *Masterson*, 309 F.3d at 272; *Newton v. Apfel*, 209 F.3d 448, 452 (5th Cir. 2000). The court does not re-weigh the evidence, try issues de novo, or substitute its own judgment for that of the Commissioner. *Masterson*, 309 F.3d at 272. "Conflicts in the evidence are for the [Commissioner] and not the courts to resolve." *Selders v. Sullivan*, 914 F.2d 614, 617 (5th Cir. 1990). The courts strive for judicial review that is

deferential but not so obsequious as to be meaningless. *Brown v. Apfel*, 192 F.3d 492, 496 (5th Cir. 1999).

B. Standard for Determining Disability and the Commissioner's Decision

In order to qualify for disability benefits, a plaintiff must prove he has a disability, which is defined under the Social Security Act as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. §§ 423(d)(1)(A) and 1382c(a)(3)(A); *Masterson*, 309 F.3d at 271. The ALJ must follow a five-step sequential analysis to determine whether a plaintiff is in fact disabled:

1. Is the claimant currently engaged in substantial gainful activity, *i.e.*, working? If the answer is yes, the inquiry ends and the claimant is not disabled.

2. Does the claimant have a severe impairment? If the answer is yes, the inquiry proceeds to question 3.

3. Does the severe impairment equal one of the listings in the regulation known as Appendix 1? If so, the claimant is disabled. If not, then the inquiry proceeds to question 4.

4. Can claimant still perform his past relevant work? If so, the claimant is not disabled. If not, then the agency must assess the claimant's residual functional capacity (RFC).

5. Considering the claimant's residual functional capacity, age, education, and work experience, is there other work claimant can do? If so, claimant is not disabled.

20 C.F.R. §§ 404.1520, 416.920; *Waters*, 276 F.3d at 718. At step five, the burden shifts to the Commissioner to show that employment for the claimant exists in the national economy. *Wren v. Sullivan*, 925 F.2d 123, 125 (5th Cir. 1991).

The ALJ engaged in the five step procedure outlined above. He found that Cooper, then 52 years old, was closely approaching advanced age and had impairments limiting her to light work with the ability to alternate positions. The ALJ determined that Cooper cannot do her past work as a cook or institutional cleaner and that she does not have work skills which are transferrable to light-work occupations. However, at step five of the sequential analysis, the ALJ concluded that Cooper is not disabled because she can do other work identified by the vocational expert including work as a small products assembler, an assembler of electronic accessories, and a hardware assembler. (Tr. 33).

III. Analysis

Coopers's motion for summary judgment raises two related challenges:[2] first, that the ALJ erred in finding that she can do other work because he incorrectly assumed she was literate; second, that the ALJ improperly failed to inquire about her reading and writing abilities.

[2] Cooper also argues that if the she is illiterate, closely approaching advanced age, and limited to light unskilled work, then rule 202.09 of the medical-vocational guidelines directs a finding of disabled, and vocational testimony to the contrary is irrelevant. Because the court concludes that the ALJ did not err in finding that Cooper was not illiterate, Grid Rule 201.09 does not apply.

A. ALJ's finding that Cooper was not illiterate

Cooper argues that the ALJ erred in finding that she can do other work because he assumed she was literate. However, the ALJ did not state that Cooper was literate, rather he found that Cooper was not illiterate (Tr. 29) and that she has a high school education (Tr. 33). A person is considered illiterate if he or she cannot read or write a simple message such as instructions or inventory lists, and generally has little or no formal schooling. 20 C.F.R. §§ 404.1564(b)(1), 416.964(b)(1). But to be considered literate or marginally educated means that the claimant need only be able to read and write well enough to hold simple, unskilled jobs. *See Glenn v. Secretary of Health & Human Services*, 814 F.2d 387, 391 (7th Cir. 1987) (explaining distinction between literate and illiterate).

Cooper has formal schooling through twelfth grade, but testified that her reading and writing skills were "not that good," that she was in special education classes, that she passed high school because of her age, and that her daughter completed her social security application. (Tr. 306). The ALJ specifically noted this testimony in his decision, but ultimately concluded that Cooper is not illiterate. (Tr. 29). This conclusion is supported by substantial evidence.

While the numerical grade level completed in school may not always represent actual educational abilities, Cooper has not provided any impact evidence showing an inability to perform the jobs suggested by the vocational expert, which are unskilled, or how these jobs require more intellectual ability than her past relevant work as a cook, a skilled occupation.

See Perez v. Barnhart, 415 F.3d 457, 464 (5th Cir. 2005) (requiring appellant to demonstrate how his limited education affected his ability to perform the jobs suggested by the vocational expert, or how those suggested jobs required more intellectual ability than did his past relevant work). Moreover, numerical grade level is properly relied upon in the absence of contradictory evidence. 20 C.F.R. §§ 416.964(b), 404.1564(b).

Cooper relies on *Albritton v. Sullivan*, 889 F.2d 640, 643 (5th Cir. 1989) to contend that when testimony about an inability to read or write is uncontroverted by any other evidence in the record, the ALJ must conclude that the plaintiff is illiterate regardless of her formal education. However, *Albritton* is easily distinguishable because Albritton who only had a fourth grade education, testified that he could neither read or write but could only sign his name. *See Albritton*, 889 F.2d at 643. In contrast, Cooper who has formal schooling through twelfth grade, never testified that she was unable to read or write anything but her name. She merely testified that her reading and writing were "not that good." Such imprecise testimony hardly mandates a conclusion that she is "functionally illiterate," as Albritton was found to be.

Cooper also argues that the ALJ posed a hypothetical question to the vocational expert which assumed she had a high school education. However, Cooper cannot complain because her attorney had the opportunity to correct any alleged defects in the hypothetical but failed to do so. *See Morris v. Bowen*, 864 F.2d 333, 336 (5th Cir. 1988) (explaining that claimant's representative had an opportunity to correct any defect in the hypothetical question by

mentioning additional limitations to the vocational expert); *Smith v. Chater*, 962 F.Supp 980, 984 (N.D. Tex. 1997) (explaining that claimant had little ground for complaint because his representative had an opportunity to correct alleged defects in the hypothetical question to vocational expert, but did not). Although the vocational expert was asked whether illiteracy would affect Cooper's ability to perform the jobs suggested, Cooper failed to follow through on this line of questioning or pose a hypothetical question which more precisely targeted Cooper's limited literacy. *See* Tr. 321.

B. Failure to inquire about reading and writing abilities

Cooper asserts that the ALJ failed to ask questions about whether she could read or write simple messages. It is the duty of the ALJ to develop the record fully and fairly to ensure that a decision is informed and based on sufficient facts. *Kane v. Heckler*, 731 F.2d 1216, 1219 (5th Cir. 1984). However, this does not mean that the ALJ must disregard the presence of claimant's own counsel and thereby assume counsel's responsibility to ask every conceivable question which might possibly support her claim. Cooper's attorney could easily have asked her questions about the extent of her reading and writing abilities or asked her to read a passage, but did not do so. Moreover, Cooper did not mention illiteracy in her request for benefits, nor did she offer any evidence indicating that she was illiterate, such as school records or standardized test results. When an applicant for social security benefits is represented by counsel the ALJ is entitled to assume that the applicant is making his

strongest case for benefits. *Glenn v. Secretary of Health & Human Services*, 814 F.2d 387, 391 (7th Cir. 1987).

IV. Conclusion and Recommendation

Given the highly deferential standard of review, the court must conclude that the ALJ's determination was supported by substantial record evidence. For these reasons, the court recommends that Cooper's motion for summary judgment be denied and the Commissioner's motion granted.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. PRO. 72.

Signed at Houston, Texas, on May 22, 2007.

Stephen Wm Smith
United States Magistrate Judge